No. 95-340

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751,
Petitioner,

v.

BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

THOMAS C. WALSH
(Counsel of Record)
MICHAEL G. BIGGERS
BRYAN CAVE LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000

ROBERT D. PICKLE
Vice President, General
Counsel & Secretary
BROWN GROUP, INC.
8300 Maryland Avenue
St. Louis, Missouri 63105
(314) 854-4110
Of Counsel

JAMES N. FOSTER, JR.
MICHELLE M. CAIN
McMAHON, BERGER, HANNA,
LINIHAN, CODY & McCARTHY
2730 North Ballas Road
St. Louis, Missouri 63131
(314) 567-7350
Attorneys for Respondent

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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QUESTION PRESENTED

Whether a labor union has standing under Article III of the Constitution to maintain a federal lawsuit for monetary damages on behalf of its individual members pursuant to the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§2101-09.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of Article III of the United States Constitution and of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§2101-09, are reproduced in the Addendum to this brief, *post* at pp. A-1 *et seq.*

STATEMENT OF THE CASE

On January 17, 1992, Respondent Brown Group, Inc., d/b/a Brown Shoe Company ("respondent" or "Brown"), sent a notice to William L. Treece, Assistant Director for Footwear, Food and Manufacturing of the United Food and Commercial Workers

International Union, advising that Brown's Dixon, Missouri, shoe manufacturing plant would be permanently closed beginning on March 20, 1992 (JA 62-63).[1] The notice was furnished pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§2101-09 ("WARN"). The addressee, Treece, was the official who had signed the collective bargaining agreement with Brown on behalf of the international union (JA 61).

On June 16, 1992, Petitioner United Food and Commercial Workers Union Local 751 ("petitioner" or "the Union") filed suit against Brown in the United States District Court for the Eastern District of Missouri under WARN, alleging that the January 17th notice failed to give sufficient or appropriate notice of respondent's intention to close its Dixon plant (JA 7).

The ten-paragraph complaint asserted that the notice was not in compliance with WARN because Treece was "not the exclusive representative of the affected employees" (JA 9 ¶7), while elsewhere petitioner referred to January 17, 1992, as "the date on which [respondent] provided [petitioner] written notice of the permanent closing of the Dixon plant pursuant to §2102(a) of the WARN Act" (JA 8 ¶6).

The suit identified petitioner as the "employee representative" for 277 union members employed at the plant "on whose behalf the relief prayed for herein is sought" (JA 8 ¶5). The Union asserted that Brown began laying off plant workers on January 31, 1992, and continued the layoffs during February and March, and that those persons were "aggrieved employees under the WARN Act entitled to relief as set forth in §2104 of the Act" (JA 9 ¶¶8, 9). Attached to the complaint was a copy of the union contract (JA 11-61) and a chart listing the names and the last day of work for the 277 employees (JA 64-73).

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[1] Brown Group, Inc., is a publicly traded corporation that has no parents and no subsidiaries that are not wholly-owned.

The prayer of the complaint requested that Brown be required to "pay each of the aggrieved employees backpay and fringe benefits, including but not limited to, vacation pay, medical expenses, and contributions to the pension plan, for 60 days or for each day of each employee's employment loss . . . ." (JA 9-10 ¶10). The Union sought no relief for itself but did request costs, including reasonable attorneys' fees, and added a boilerplate prayer for "such other and further relief on its behalf and that of the aggrieved employees as may be proper" (JA 10).

Brown filed a motion to dismiss pursuant to Rule 12, Fed. R. Civ. P., challenging the Union's standing to maintain this action (JA 74). On April 12, 1993, the district court (Judge Edward L. Filippine) granted the motion and dismissed the complaint, concluding that the court was without jurisdiction because the Union had "not alleged injury to itself" and lacked constitutional standing to bring a WARN Act claim for monetary damages on behalf of its members, none of whom had been joined as parties. 820 F. Supp. 1192.[2]

On appeal, the Eighth Circuit affirmed in a unanimous opinion authored by Judge Pasco M. Bowman for a three-judge panel. 50 F.3d 1426. The court held that the Union had failed to establish either direct or associational standing and that the district court therefore had properly dismissed the complaint for lack of jurisdiction. With respect to the Union's direct standing to assert its own rights, the Eighth Circuit determined that the relief requested by the Union would not redress the Union's supposed injury. *Id.* at 1430. It rejected the Union's argument that the

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[2] Following the dismissal of this case, 63 of those members filed their own complaint in the United States District Court for the Eastern District of Missouri against respondent, on behalf of themselves and similarly situated employees, alleging the same violation of the WARN Act that was asserted in this action. *Aaron v. Brown Group, Inc.*, No. 4:94CV000207 TIA (E.D. Mo.). The plaintiffs in *Aaron* have amended their complaint three times to add an additional 79 plaintiffs, all of whom were represented by the Union when they were employed at the Dixon plant.

"catch-all prayer for relief" would remedy the "injury" resulting from respondent's alleged failure to give notice to the Union. *Id.* Judge Bowman reasoned, "We do not think that the boilerplate remedies language . . ., broad and nonspecific as it is, comports with the constitutional requirement of redressability envisioned by the Supreme Court in *Allen* [*v. Wright*, 468 U.S. 737 (1984)] and its other cases on the subject." *Id.* The court also specifically rebuffed the Union's argument that the language of WARN granting a union a right to sue to enforce the Act "relieve[s] the union of its obligation to meet the constitutional requirements of standing." *Id.*

Although the Union's brief to the Eighth Circuit expressly disavowed any reliance on the concept of "associational standing," the Court of Appeals addressed the issue nonetheless, apparently because it had been pleaded by petitioner and discussed by the district court. The court held that the Union had failed to meet the third part of the test for associational standing set forth by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), namely, that "'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" 50 F.3d at 1431. The appellate court reasoned that the relief the Union requested — backpay and benefits for its members — would require individualized proof because of the varying times of termination of each employee as alleged in the complaint, as well as the fact that the employees "were paid on a piecework basis." *Id.*

The Union's petition for rehearing and suggestion for rehearing en banc were denied without recorded dissent (JA 6).[3]

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[3] The district court had denied petitioner's belated request to amend its complaint to add individual union members as plaintiffs (JA 76), and the Court of Appeals also affirmed that aspect of the judgment. 50 F.3d at 1432. The Petition for Certiorari did not challenge that portion of the ruling.

SUMMARY OF THE ARGUMENT

The WARN Act requires an employer to give 60 days' advance notice of a proposed plant closing or mass layoff. If the affected employees are represented by a union, the notice is to be sent to the union; the local unit of government must also be notified. Section 2104(a) authorizes lawsuits to enforce the obligation to provide an appropriate notice. Paragraph (1) of §2104(a) creates a cause of action belonging to, and authorizes back pay and certain lost benefits for, "each aggrieved employee who suffers an employment loss as a result of such closing or layoff." Paragraph (3) imposes a "civil penalty of not more than $500 for each day of such violation," payable to the local community where the plant is situated. Paragraph (5) provides venue for actions brought in federal court by persons "aggrieved under paragraph (1) or (3)" of §2104(a)

In this case, the Union filed suit "on behalf of" 277 union members at respondent's Dixon plant, who were otherwise identified as "the aggrieved Brown Shoe employees on whose behalf the relief prayed for herein is sought" (JA 8). The complaint requested back pay and benefits for the affected employees (all of whom had individual piece-work wage rates) and attorneys' fees. The Union did not assert that it had suffered any injury as a result of the allegedly defective notice; it did not seek any remedy for itself; nor did it indicate in its complaint how or if the relief prayed for would redress any injury the Union might have suffered.

The plain language of WARN does not support the maintenance of this action by the Union, which admittedly was not "aggrieved under paragraph (1) or (3)" of §2104(a). The legislative history of WARN reveals (a) that the thrust of the statute was to require notice for the benefit of affected employees and local communities, not unions; (b) that in the case of union workers, notice was to be given to the union *for the benefit of* the members as a convenience to the employer so that it would not

need to provide hundreds or thousands of personal notices; and (c) that, to the extent that the "representative" referred to in §2104(5) is the union, such a designation does not reflect a conscious conferral of authority to sue but is a mere vestige in a venue provision from earlier bills that would have given the union an independent right and allowed the union to recover a penalty for violation of that right.

The Union lacks standing because it has not pleaded — and cannot show — any "injury-in-fact." This Court's standing jurisprudence requires a plaintiff to demonstrate, *inter alia*, that one of its "legally-protected" interests has suffered an injury that is distinct, concrete, real and immediate, not abstract. *Warth v. Seldin*, 422 U.S. 490 (1975); *Allen v. Wright*, 468 U.S. 737 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Here, the furnishing of an allegedly defective notice did not cause constitutional "injury" to petitioner because the Union was a mere conduit of the notice to its members; it suffered nothing more than a "procedural injury" of the type held insufficient to support standing in *Lujan*. The Union's complaint did not contain the kind of specific allegations of interference with its ability to function or to carry on its business that are necessary for an organization to have standing to sue in its own right. Petitioner cannot bootstrap itself into Article III by claiming in its brief that a timely notice would have facilitated performance of its duties as collective bargaining representative because it did not plead any such "injury," and nothing in the language or history of WARN suggests that Congress designed the notice to serve those purposes anyway. Moreover, in its collective bargaining agreement with Brown, petitioner specifically recognized the right of the employer "to close a plant permanently" and waived any right to negotiate concerning a plant-closing decision or its effects.

Standing is also wanting because the remedy sought in the complaint — back pay and certain benefits for plant workers —

will not redress the alleged failure of the Union to receive an appropriate or timely notice. To "redress" the Union's procedural "injury" would require ordering the plant to remain open until 60 days after the furnishing of a proper notice, but Congress has specifically prohibited injunctive relief in §2104(b). Any suggestion that back pay to employees would redress the Union's putative "injury" is necessarily speculative and thus inadequate for Article III purposes. *Lujan*, 504 U.S. at 561; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). Hence, to entertain this case would violate the well-ingrained principle that Article III judicial power "exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth*, 422 U.S. at 499.

Petitioner contends that Congress may create rights in persons and empower them to sue for infringement of those rights. But the mere capacity to appear in court does not *per se* create standing, and Congress cannot abrogate the Article III minimum requirement that "a plaintiff must always have suffered 'a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted.'" *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). This Court, accordingly, has not hesitated to reject standing claims even when the plaintiffs have fallen squarely within the class authorized by Congress to sue. *E.g.*, *Lujan*, 504 U.S. at 576; *Sierra Club v. Morton*, 405 U.S. 727 (1972). For Congress to attempt to require the courts to hear a particular case that does not otherwise meet the injury and redressability requirements of Article III would violate the separation of powers.

Neither petitioner's status as exclusive bargaining agent for the affected employees nor §301 of the Labor Management Relations Act supports standing under WARN. The right to bargain collectively for union members does not constitute the Union their general litigating agent. The rights petitioner purports to assert here do not stem from the collective bargaining

agreement, and the Union's status as collective bargaining agent creates nothing more than the kind of "abstract concern" that is insufficient under Article III. Section 301 empowers the Union only to vindicate breaches of contractual undertakings by the employer, not to litigate tort and other statutory claims. A union without a damage claim of its own simply does not have Article III standing to maintain a non-contractual action for damages on behalf of its members. And no court has approved the standing of any association to sue for individualized damages for its constituents unless they are joined as parties.

Petitioner does not claim "associational standing" and does not attack the Court of Appeals' interpretation or application of *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Instead, it argues that its status as the collective bargaining "representative" gives it Article III standing similar to that of parties to third-party-beneficiary contracts, trustees, guardians, and the like. Petitioner does not possess the critical attributes of the "representatives" to which it likens itself and is not asserting the type of actions with which they are traditionally associated. In any event, the status as a representative, without more, does not satisfy the standing requirements of Article III. Nor can petitioner derive any comfort from the fact that certain governmental agencies are authorized to maintain actions to recover damages under the statutes they are charged with administering and enforcing. The Union is not comparable to, say, the EEOC, which is an executive-branch agency specifically created by Congress to vindicate the rights of victims of discrimination by pursuing violators of the laws which that agency administers.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISMISSAL OF THE UNION'S COMPLAINT BECAUSE THE UNION DID NOT SUFFER ANY CONCRETE, DISTINCT, AND PALPABLE INJURY THAT WAS REDRESSABLE BY AWARDS OF BACK PAY TO INDIVIDUAL PLANT WORKERS AND THEREFORE LACKS STANDING TO MAINTAIN THIS ACTION

Standing, of course, finds its roots in Article III of the United States Constitution. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Warth v. Seldin*, 422 U.S. 490 (1975). This Court has said that no principle is more fundamental to the orderly functioning of the judiciary and its commitment to decide real issues, rather than abstract questions, so as to grant judgments that redress concrete injuries instead of rendering opinions that run the risk of trampling on the separation of powers. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974).

It is also axiomatic that the plaintiff's standing must be established by the allegations of its complaint. *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This Court presumes that federal courts lack jurisdiction unless "'the contrary appears affirmatively from the record.'" *Renne v. Geary*, 501 U.S. 312, 316 (1991), quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986). "'It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Id.*, quoting *Warth*, 422 U.S. at 517-18. The Court cautioned in *Allen*, 468 U.S. at 752, that "[t]ypically ... the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plain-

tiff is entitled to an adjudication of the particular claims asserted."

The elements of Article III standing were summarized in *Allen*:

> "The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. . . .
>
> "The injury alleged must be, for example, 'distinct and palpable'. . . and not 'abstract' or 'conjectural' or 'hypothetical'. . . . The injury must be 'fairly' traceable to the challenged action, and relief from the injury must be likely to follow from a favorable decision." 468 U.S. at 751 (internal citations omitted).

Petitioner's entire presentation to this Court is pegged on the assumption that WARN specifically endorses this lawsuit and automatically satisfies the requisites for standing. Petitioner has misread the WARN Act and has misconstrued this Court's standing jurisprudence.[4]

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[4] As it did in the Court of Appeals, the Union disclaims any reliance on "associational standing" (Br. 8-9) and does not request reversal based on that doctrine. Its "Question Presented" does not fairly comprise any notion of associational standing, and its Argument is limited to direct standing (Point I) and "representational" standing (Point II). Although the government, as amicus curiae on behalf of the Labor Department, seeks to inject the associational standing doctrine into the case, an amicus cannot add to the Question Presented by the petitioner and cannot expand the issues briefed by the parties. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531-32 n.13 (1979).

A. The WARN Act Does Not Specifically Designate a Union as a Proper Litigant for Back Pay for Aggrieved Plant Workers.

In 29 U.S.C. §2104(a)(1) Congress provided that an employer who fails to furnish a proper notice of a plant closing is liable "to each aggrieved employee who suffers an employment loss as a result of such closing." An "aggrieved employee" is defined in §2104(a)(7) as an employee who does not receive, directly or indirectly, the notice called for by §2102(a)(1). Section 2104(a)(1) thus limits the congressionally-created cause of action for a violation of the §2102(a)(1) notice provision to the individual "aggrieved" employees.

Petitioner argues that paragraph (5) of §2104(a) authorizes any union to seek WARN back pay for its members, but the literal language of that provision does not support such an interpretation. Paragraph (5) provides as follows:

> "*A person* seeking to enforce such liability, *including a representative* of employees *or a unit of local government aggrieved under paragraph (1) or (3)*, may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." (Emphasis added.)

The parties authorized to sue under this provision are those "aggrieved under paragraph (1) or (3)." Paragraph (1) provides back pay and certain benefits for "each aggrieved employee who suffers an employment loss as a result of such closing or layoff." Paragraph (3) imposes a "civil penalty of not more than $500 for each day of such violation," payable to the community where the plant is located. Obviously, a union as the statutory "representative of employees" is not "aggrieved under paragraphs (1) or (3)." It is therefore not entitled to bring a suit for back wages or for the fine payable to the local governmental unit.

Petitioner essentially contends that anyone mentioned in paragraph (5) automatically has standing to sue for a violation of WARN. But if that interpretation were correct, an affected unit of local government could also bring an action for back wages for the employees, and, presumably, a union could sue for the fine payable to the local community — scenarios obviously inconsistent with congressional intent, principles of grammar and syntax, and common sense. Moreover, the language authorizing suit to be brought "for such person or other persons similarly situated" cannot include the union as employee representative, for unions are not "similarly situated" with their members.

Hence, the statutory structure itself refutes the foundational predicate of petitioner's theory, *i.e.*, that Congress has specifically conferred standing on unions to sue in their own right. Read as a whole and in context, §2104(a)(5) is basically, if not entirely, a *venue* provision, designed to ensure that suits to enforce the rights created by §§2104(a)(1) and (3) can be freely brought anywhere the employer transacts business, as well as the more obvious situs of the violation.

Petitioner's repeated insistence that Congress was concerned about the rights and welfare of unions when considering plant-closing legislation, including WARN, is belied by the legislative history. Plant-closing legislation was introduced in 1987 as the Economic Dislocation and Worker Adjustment Assistance Act, S. 538, 100th Cong., 1st Sess., *reprinted in* S. Rep. No. 62, 100th Cong., 1st Sess. 45 (1987). Unlike the ultimately-adopted WARN Act, S. 538 actually would have given a real *right* to a union that received notice of a proposed plant shutdown. Section 333 of that bill allowed the "representative of the affected employees" to make a request to the employer for information concerning its financial status, feasibility studies, and relocation plans and obligated the employer to supply an appropriate response.

S. 538 included an enforcement provision, §334(a)(3), which expressly granted the union a cause of action for an employer's failure to furnish the requested information:

> "(3) Any employer who violates the provisions of section 333 shall be liable to the party requesting the information for a civil penalty in an amount not to exceed $10,000."

Section 334(a)(6) of that bill also provided venue for suits by any of the three groups of potential litigants for whom rights and remedies were specified:

> "(6) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1), (2), or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business."

Subsequent events altered the statutory scheme. The Senate incorporated S. 538 into H.R. 3, the Omnibus Trade and Competitiveness Act of 1987 (H.R. 3, 100th Cong., 1st Sess., 133 Cong. Rec. S9390 (1987)). In the process, §333 and §334(a)(3) were deleted by amendment, thereby eliminating a union's right to information and the "penalty" recoverable by the union. 133 Cong. Rec. S9367 (1987). The venue provision was accordingly revised but, without explanation, the reference to a suit by "a representative of the employee" was retained even though the union no longer had any rights.[5] This was the text which, after President Reagan's veto of H.R. 3, was reintroduced as a

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[5] Congress may have retained the reference to a "representative" (in the general sense, not as defined by the statute) because the venue provision contemplated the maintenance of class actions brought "for other persons similarly situated." A person bringing such a suit, of course, would sue as the "representative" of the class. The House conference report, in summarizing the enforcement provisions, contains no reference to suit by a union but indicates only that "A person seeking to enforce the liability provisions of this part may sue individually or on behalf of others similarly situated." *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988), *reprinted* in 1988 U.S.C.C.A.N. 1033, 2085.

separate measure (S. 2527, 100th Cong., 2d Sess. (1988)) and eventually became law.

This history demonstrates that the reference to the "representative" in §2104(a)(5) was not a conscious appointment of a union as vindicator of its members' rights but rather a mere remnant of the previous proposal in which the union was actually afforded its own right and remedy. To be sure, the venue provision as modified and finally passed retained the language referring to a "representative," but the statute gave a union no right or remedy concerning a notice. The only action to recover back pay and other benefits for the affected workers was given to those workers.

Time and again during the contentious debate over this legislation and its earlier embodiments, both proponents and opponents stated that the purpose of the proposal was to aid workers and communities.[6] The dialogue over advance notification rarely included any reference to unions or organized labor. Two of the three main House sponsors of plant-closing legislation specifically stressed that prior notification was *not* for the benefit of unions:

> "Many unions already have notice provisions in their contracts, so today's vote isn't about unions. Today's vote is about workers. It's about the 80 percent of the work force that is not represented by unions and has no protections from sudden dislocation. . . . This isn't a union bill. This is a worker's bill. This is a bill about workers, their families

[6] *See, e.g.*, S. Rep. No. 62, 100th Cong., 1st Sess. 3, 4, 12, 22, 30 (1987); 133 Cong. Rec. S9399-9400 (daily ed. July 8, 1987) (statement of Sen. Adams); 133 Cong. Rec. S9487-88 (daily ed. July 9, 1987) (statements of Sen. Kennedy and Sen. Metzenbaum); 133 Cong. Rec. S9490 (daily ed. July 9, 1987) (statement of Sen. Levin); 133 Cong. Rec. S9490 (daily ed. July 9, 1987) (statement of Sen. Dole); 133 Cong. Rec. S9491 (daily ed. July 9, 1987) (statement of Sen. Gore); 133 Cong. Rec. S9621 (daily ed. July 10, 1987) (statement of Sen. Heinz).

> and their communities." 131 Cong. Rec. H10476 (daily ed. Nov. 21, 1985) (statement of Rep. Conte regarding H.R. 1616, 99th Cong., 1st Sess. (1985).
>
> "[W]e do not need this for the auto industry. We do not need this for the steel industry, because we have union contracts in industries like that to provide for more notice, severance pay and all kinds of things that this bill does not do for them; so this bill is not for the large unionized industrial employers. They are already being responsible in a contractual way, if not any other way." 131 Cong. Rec. H10481 (daily ed. Nov. 21, 1985) (statement of Rep. Ford).

The legislative history further indicates that the reason for requiring notice to the "representative" rather than to the individual employees was so that the employer would not be forced to give personal notification to hundreds or even thousands of workers. *See* 131 Cong. Rec. H10216-17 (daily ed. Nov. 14, 1985) (statement of Rep. Ford) (the purpose of notifying the union, in the case of an organized plant, is so that the employer "does not have to call in 12,000 employees and consult; he notifies their agent that they have designated, their union, and he has complied with the notice. He does not have to go looking for 12,000 employees"); (statement of Rep. Levin) ("I believe that this provision about consulting with the representative is placed there basically for the protection of the employer"). *Id.*

Accordingly, petitioner's intense focus on "the litigation scheme" of WARN (Br. 16-27) misconstrues the statute and attributes to Congress an intent it did not have.[7]

[7] Because petitioner's Question Presented is thus erroneously premised exclusively on "Congress' express statutory authorization" for a union to sue for its members' back pay under WARN, which petitioner concedes to be a threshold issue (Br. 14), it would be appropriate for the Court to dismiss the writ of certiorari as improvidently granted.

B. Petitioner Has Not Established Any "Injury-in-Fact."

For standing purposes, a plaintiff must plead and prove that it has suffered an actionable "injury," which must be "distinct," "palpable" and "concrete," "real and immediate," not "abstract." *See Warth*, 422 U.S. at 501; *Allen*, 468 U.S. at 755-56; *Schlesinger*, 418 U.S. at 220-21; *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). And the injury must be to a "legally-protected interest." *Lujan*, 504 U.S. at 560. Petitioner's claim does not pass this test.

This "injury-in-fact" requirement imposes the obligation on a would-be plaintiff to allege "specific, concrete facts demonstrating that the challenged practices harm *him*." *Warth*, 422 U.S. at 508 (emphasis in original). Quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973), the Court in *Warth* also stated:

> "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" 422 U.S. at 499.

Accord, *Gladstone, Realtors*, 441 U.S. at 99.

Yet in its complaint petitioner specifically and repeatedly alleged that it was suing "on behalf of" the affected plant workers. Nowhere did it plead that respondent's actions had caused the Union itself any harm. Whatever the statutory intendment, in *this* case *this* union did not *plead* that its failure to receive an appropriate notice caused any injury to itself. Its complaint was therefore properly dismissed because it did not plead the first element required for constitutional standing.

In this Court the Union's brief advances the unpleaded thesis that WARN gives it a "statutory" or "legal" right to notice of plant closing (Br. 11, 36) and that a misaddressed or deficient

notice is a distinct and palpable injury to the Union itself. This revisionist appellate advocacy runs afoul of the very provisions of the WARN Act, which consistently identify the right to notice as belonging to the employees. The title of §2102(a) is: "Notice to employees, state dislocated worker units and local governments." Nothing about unions. Section 2107(b), which specifies alternative ways to provide notice, characterizes them as other "acceptable methods for fulfillment of the employer's obligation to give notice *to each affected employee under this Act*." *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1051 (1988) (underscoring that the notice belongs to the employee by referring to its receipt "either directly or through the employee's representative"); *see also* 29 U.S.C. §2105 (which is captioned "Procedures in addition to other rights of *employees*" and which references the "rights and remedies provided to *employees* by this Act").[8]

Petitioner's recurring contention that the notice was designed to enable it to take various steps to protect its own interests (Br. 11) or the employees (Br. 19) finds no support in the statute or in the record. The Union's only role under WARN is that stated in §2102(a)(1), *i.e.*, to serve as the conduit to the affected employees for notice from the employer. Congress did not empower a union to do *anything* with a notice, and did not authorize it to do anything based on non-receipt of a notice. As explained above, Congress created the statutory notice requirement primarily for the benefit of non-union workers.[9]

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[8] In its regulations promulgated under WARN, the Department of Labor likewise has emphasized that the purpose of the Act is to provide "protection to workers, their families and communities by requiring employers to provide notification." 20 C.F.R. §639.1(a). Unions are conspicuously and significantly absent from that list of protected entities. *See also* 20 C.F.R. §639.2 (stating that WARN requires employers to give "affected employees at least 60 days' notice").

[9] The Union's assertion that WARN imposes a legal duty which "flows" "to the Union *alone*" (Br. 25), and the union amici's argument that WARN

(Footnote 9 continued on next page)

In Article III parlance, the Union's entitlement to receive a WARN Act notice is not a "legally-protected interest." If it can be called a "right" at all, it is a purely "procedural right" to facilitate the *employees*' substantive rights. The only "distinct," "palpable," "concrete" or "real" injury resulting from a misaddressed or deficient notice is felt by those employees, not by the Union.

This is further demonstrated by WARN's remedial scheme in §2104. Section 2102(a) does not create a cause of action and does not declare that it is unlawful for the employer to fail to send a proper notice. Section 2104(a)(1) creates a liability for such a failure, expressly restricted to "each aggrieved employee." The Act specifically prohibits any kind of injunctive relief, whether to compel the issuance of a notice to the union, to prevent any employer action until after delivery of a proper notice to a union, or to require the plant to remain open. 29 U.S.C. §2104(b). Nor is the union entitled to damages.

Petitioner's claim that its role as designated recipient of notice gives *it* a legal right entitling it to maintain this action on its own behalf is essentially identical to the claim asserted by the plaintiffs in *Lujan*, 504 U.S. 571-72, that they had suffered a "procedural injury" arising from the failure of federal agencies to engage in inter-agency consultation pursuant to the Endangered Species Act. Although the nature of the relief sought is admittedly different here, the present scenario is nonetheless identical to *Lujan* in that:

> "This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their

(Footnote 9 continued)

Act rights are "fundamentally collective in nature" with "[t]he principal rationale" of allowing unions to help employees with reemployment (Union Amici Br. 11, 13), are particularly blatant distortions of the statute.

> license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." 504 U.S. at 572.

Here, as there, the alleged violation of this "procedural right" does not create any "injury-in-fact" to the Union. Petitioner suffered no "concrete" or "particularized" consequences, or any "distinct" or "palpable" injury, from the supposedly deficient notice because it was not directly affected by the notice. Its lack of standing flows directly from *Lujan's* rejection of the theory that "violation of a . . . procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)." 504 U.S. at 573 n.8. *See also Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 336 (1980) (appellants had Article III basis to appeal denial of class certification, not because of their "interest" in a correct procedure, but because of their alleged economic interest in shifting costs of litigation to the class); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 410 (1980) ("Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject — or with the rights of third parties — for the concrete injury required by Art. III") (Powell, Stewart and Rehnquist, JJ., dissenting).

Petitioner's reliance on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (Br. 15), is misguided for two reasons. There, Congress had declared it "unlawful" to fail to provide certain information about available housing, and in upholding standing the Court emphasized that it was that term in §804(d) of the Fair Housing Act that established "an enforceable right to truthful information," the violation of which constituted Article III injury. *Id.* at 373-74. Furthermore, the *organization* granted standing for itself in *Havens* did *not* predicate its standing on this "right"; it was allowed to proceed based on concrete, specific

allegations of interference with its ability to render counselling and referral services. *Id.* at 379.[10]

Petitioner's claim of "injury-in-fact" also appears to hinge heavily on the theory that recovery of monetary damages by its employees may serve a deterrent function (Br. 21). This "interest" does not fill the Union's injury void. There is nothing in the pleadings to establish "injury" to such an "interest" or to indicate that any presumed deterrence purpose has any relevance to *this* petitioner or to *this* case. The record is barren of any showing that petitioner represents respondent's employees at other plants which, but for such presumed deterrence, might conceivably be closed without compliance with the WARN Act. There is no averment that recovery by the Dixon employees will alter respondent's behavior in other locations.[11]

Apart from its core claim that its role as agent for receipt of notice gives rise to a legally enforceable right, petitioner and its amici seek to bootstrap petitioner into Article III through various essays on the general prominence of unions in the context of plant closings. In particular, both the government (U.S. Amicus Br. 16) and the unions (Union Amici Br. 15) argue that notice is important to a union because it facilitates the union's right to bargain with the company over the effects of a plant shutdown. Whatever the general relevance of such a proposition, it has no

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[10] These are the kinds of allegations (injury to "concrete programmatic organizational interests," *i.e.*, to the organization's operations or to the work in which it is engaged) which the courts recognize when they grant an organization standing to sue on its own behalf. *Compare Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) *with Mountain States Legal Found. v. Costle*, 630 F.2d 754, 767 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981).

[11] Likewise, the Eighth Circuit correctly rejected the suggestion that the Union sustained Article III injury on the basis of lost dues it would have received from respondent's workers. As the Court of Appeals noted, petitioner had never made any such allegation of injury in the district court. 50 F.3d at 1429 n. 4.

application here because the collective bargaining agreement between petitioner and respondent specifically acknowledged the right of the company "to close a plant permanently" and provided severance pay and other benefits for the affected employees in such an event (JA 51). In return, the Union formally waived any other rights to negotiate "concerning the decision to close a plant and concerning the effect of such a decision upon the affected employees" (JA 52).

As for the other theoretical opportunities that might be available to a union if it had 60-days' advance notice of a proposed plant closing, suffice it to say that these ethereal musings about the mission of organized labor (a) were not pleaded and do not otherwise appear in the record, (b) fallaciously assume that a union will not otherwise learn of a plant-closing decision until after the gates have been locked forever, and (c) hardly qualify, in any event, as concrete "injury-in-fact."

C. Petitioner Has Not Established That Any Alleged Injury to It Was Redressable in This Case.

In addition to "injury-in-fact," Article III requires that the injury asserted must be likely to be redressed or remedied by the relief sought. *Allen*, 468 U.S. at 751 ("relief from the injury must be 'likely' to follow from a favorable decision"); *Simon*, 426 U.S. at 38 (plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision"); *Lujan*, 504 U.S. at 561 (likelihood of redress must not be merely speculative). This element recognizes that Article III judicial power "exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth*, 422 U.S. at 499. Hence, a claimant must demonstrate "that he personally would benefit in a tangible way from the court's intervention." *Id.* at 508.

The redressability component "examines the causal connection between the alleged injury and the judicial relief requested."

Allen, 468 U.S. at 753 n.19. This necessarily entails analysis of the specific relief sought by the would-be litigant against the background of its "injury." Petitioner here prayed for a monetary award to the former Dixon plant workers and did not seek anything for itself for *its* putative "injury." But back pay for employees would not, and could not as a matter of law, redress any supposed "injury" to petitioner attributable to a defective notice of proposed plant closing. If any such "injury" existed, it could be repaired only by an order which in some fashion would delay the time for closing the Dixon plant until 60 days after delivery of a proper notice. No such injunction was sought here for the obvious reason that WARN expressly prohibits it. 29 U.S.C. §2104(b).

The Court of Appeals succinctly analyzed both the redressability defect arising from petitioner's prayer for relief and the inherent infirmity which afflicts any WARN suit by a union:

> "The [Union], even if it has properly pleaded injury to itself as a result of the alleged failure of statutory notice, has not sought a specific remedy for its injury. An award of monetary damages to any aggrieved employees would do nothing to remedy the alleged failure of notice to the [Union]." 50 F.3d at 1430.[12]

In *Simon* this Court denied standing to indigents who sued the IRS for arguably violating the law by allowing favorable tax treatment to hospitals which did not give full service to poor people. The Court's determination was based on the fact that

[12] The criticism of this analysis by the United States (U.S. Amicus Br. 18) is disingenuous. This Court in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), did not intimate that the rights of applicants who were denied housing "conferred" rights on current residents or that an injury to the applicants was redressable by relief to the tenants. Rather, the current residents' standing was based entirely on the allegation of separate injuries to their own personal interests. *Id.* at 208, 209-10.

"the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire." 426 U.S. at 45-46. Here, the complaint does not merely hint at the absence of a substantial likelihood of redress; it shows conclusively on its face that there is no remedy available to the Union for the asserted "notice" injury. There is no way that an award of monetary damages to employees in an action filed in June 1992 (after the plant was closed) will redress a union "injury" from a defective notice in January 1992.

In *City of Los Angeles*, 461 U.S. at 105 & 107 n.8, the plaintiff had indisputably suffered a past injury from a chokehold but lacked standing to pursue injunctive relief because there was a fundamental discontinuity between the proven injury and the relief sought. This case features a similar disconnect, in that the relief prayed for would not and could not alleviate any injury experienced by the Union. *See also Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (no standing to challenge data used by Secretary of Commerce because plaintiffs did not establish that "more accurate" data would have altered the result); *Safir v. Dole*, 718 F.2d 475, 480 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984); ("the constitutional requirement of standing was not met because the prospect that the remedy sought would produce tangible benefit to the plaintiffs was speculation"); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267-68 (9th Cir. 1982) (Congressional grant of "standing" for environmental concerns did not permit review of appropriations because decree "would be ineffective to vindicate environmental concerns"). *Cf. Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540-43 (1983) (indirect and speculative nature of union's claimed injuries prevented standing under the antitrust laws).

Petitioner's effort to establish redressability by reference to a purported function of the notice to facilitate the union's role in assisting employees (Br. 24) is untenable. Petitioner does not point to anything in the statute or its legislative history to indicate

that this was the purpose of the notice, and as discussed above, it was not. Petitioner also fails to explain how a monetary award to the employees, made years after the plant closing, will redress or assist the union's response to the closing.

Petitioner's theoretical interest in deterrence cannot transform this case into an Article III controversy. It is inherently and inevitably speculative whether a monetary award to the Dixon plant workers will have any effect on Brown's future conduct or on that of any other employer. Certainly nothing in the record warrants a finding of any such deterrence.

The Union is thus similarly aligned with the mother who failed to establish standing in *Linda R.S.* She sought enforcement of a statute which was triggered by the father's failure to support a child and which created "a completed offense with a fixed penalty." 410 U.S. at 618. In denying standing, this Court stated that "The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.* Here, where the "fixed penalty" for the "completed offense" is not the incarceration of an individual but simply a monetary award to be paid by a large corporation, the idea that enforcement of the statute will alter future behavior is equally speculative in the Article III sense (and probably more speculative in the colloquial sense).

The redressability defect in this lawsuit does not, as petitioner and its amici urge, impinge on Congress' discretion to choose a remedial scheme. The decision below has no effect on the scheme adopted by Congress — monetary awards to employees. Congressional "discretion" simply does not extend to the annointing of a particular litigant in violation of Article III.

D. The WARN Act Does Not Displace These Article III Requirements.

At bottom, the Union's position before this Court is that Congress, by granting it the right to receive a notice under

WARN, and supposedly to sue on behalf of its members, has *ipso facto* conferred standing on it to enforce the WARN Act and that such action is appropriate because petitioner is the authorized collective bargaining representative for its members (Br. 12). The Union's simplistic syllogism ignores some fundamental and dispositive considerations. "Standing does not refer simply to a party's capacity to appear in court." *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Even if Congress has created the capacity in the Union to sue under WARN, that is not determinative of the standing question, for Congress unquestionably cannot override the requirements of Article III. *Gladstone, Realtors*, 441 U.S. at 100 ("In no event . . . may Congress abrogate the Art. III minimum: A plaintiff must always have suffered 'a distinct and palpable injury to himself' . . . that is likely to be redressed if the requested relief is granted"); *Association of Data Processing Ser. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Simon*, 426 U.S. at 41 n.22; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 & 487 n.24 (1982). A congressional authorization to sue "does not of its own force establish that there is an injury in 'any person' by virtue of any 'violation.'" *Lujan*, 504 U.S. at 580 (Kennedy and Souter, JJ., concurring).

The Union's total dependence on Congress' alleged conferral of capacity to sue is unjustified, for this Court must independently scrutinize all claims to standing. For example, in *Lujan* standing was denied notwithstanding the fact that the plaintiffs, as citizens, were members of the class specifically permitted by Congress to bring suit. Indeed, the Court described the Court of Appeals' contrary conclusion, based upon the "procedural right" contained in the statute, as "remarkable." 504 U.S. at 572. In response to the very thesis advanced here by petitioner, the *Lujan* Court said:

> "[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the

courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch — one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches." 504 U.S. at 576.

Other decisions of this Court have likewise found standing wanting in the face of a congressional grant of capacity to sue. In *Sierra Club*, the Court dismissed a suit by an environmental group which tried to block development of a ski resort in a national forest. The organization claimed to be "aggrieved" and "adversely affected" pursuant to section 10 of the Administrative Procedure Act. The Court ruled that not only must there be injury to a cognizable interest but that the "party seeking review be himself among the injured." 405 U.S. at 735. Even though the Sierra Club was earnestly devoted to the cause espoused, its claim was not justiciable:

> "But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Id.* at 739.

Accord, *Simon*, 426 U.S. at 45-46 (individuals have no standing, despite APA, in the absence of concrete injury and the "substantial likelihood that victory in this suit would result in" their achieving the remedy they desire).

Of particular relevance is *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho), *aff'd*, 454 U.S. 1025 (1981). After the Senate confirmed the appointment of former Congressman Abner Mikva as a Circuit Judge for the District of Columbia Circuit, Congress also enacted a provision which authorized any senator or representative to file suit to challenge that particular appointment on the grounds of a violation of the "ineligibility clause" of the Constitution.

A lawsuit filed by Senator McClure pursuant to this provision was dismissed by a three-judge district court for lack of an Article III case or controversy. Pointing out that in the absence of a statute authorizing such suits a senator would plainly lack standing (*e.g.*, *Ex parte Levitt*, 302 U.S. 633 (1937)), the court held that Congress could not cure the jurisprudential deficiency by mere legislative fiat. 513 F. Supp. at 271. The court said that Article III — and the separation of powers doctrine which underlies it — could not be circumvented by the simple expedient of a congressional conferral of capacity to sue where the traditional trappings of a case or controversy were not present. *Id.*[13] In sum, then, a congressional grant of authority to sue may be the beginning — but is never the end — of the Article III standing inquiry.

In assuming below that injury-in-fact existed, the Eighth Circuit relied on a statement in *Linda R.S.* (quoted in *Warth* and *Havens*) that Congress can create rights, the violation of which will satisfy Article III requirements. 50 F.3d at 1430. But the court misconstrued *Warth* and *Linda R.S.* As Justice Scalia explained in *Lujan*:

> "Both of the cases used by *Linda R.S.* as an illustration of that principle involved Congress's elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law .... As we said in *Sierra Club*, '[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different

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[13] In the same vein, the First Circuit in *Conservation Law Found. v. Reilly*, 950 F.2d 38 (1st Cir. 1991), and *United States v. AVX Corp.*, 962 F.2d 108 (1st Cir. 1992), dismissed environmental claims for lack of standing despite the fact that the plaintiffs fell within the class of persons expressly granted capacity to sue by Congress.

matter from abandoning the requirement that the party seeking review must himself have suffered an injury.'" 504 U.S. at 475, quoting *Sierra Club*, 405 U.S. at 738.

This conclusion is buttressed by the opinion of Justices Kennedy and Souter in *Lujan*, joining in the "procedural injury" portion of Justice Scalia's analysis. In Justice Kennedy's words, to exercise the power to define injuries and articulate chains of causation to satisfy Article III:

> "Congress must at the very least identify the injury it seeks to vindicate and *relate the injury to the class of persons entitled to bring suit.*" 504 U.S. at 580 (emphasis added).

In *Lujan* the Endangered Species Act flunked this test because it did not "of its own force" establish that there was an identifiable injury to the class of persons to whom it purported to give the keys to the courthouse. Here, in comparable fashion, Congress did not identify *any* injury to the union and did not connect any such injury to a suit by a union to recover monetary damages for the injury suffered by the individual workers. Even giving full weight to the congressional direction in WARN that the employer's notice be delivered to the union, petitioner's plight is akin to that of the plaintiffs in *Schlesinger*, 418 U.S. at 223 n. 13, who merely experienced an "abstract injury in nonobservance of the Constitution," or the complainants in *Valley Forge*, 454 U.S. at 485, who failed "to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." This Court's words in *Allen* are fully applicable:

> "Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystand-

> ers.'" 468 U.S. at 756, quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973).[14]

This Court's precedents which have seemingly approved a congressional expansion of standing have, in reality, merely recognized that "Congress may expand standing to the full extent permitted by Art. III." *Gladstone, Realtors*, 441 U.S. at 100; *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (finding standing under statute conferring capacity on "any individual eligible to vote" only because certain appellants alleged a personal stake that permitted "specific relief of a conclusive character"); *Warth*, 422 U.S. at 501. This principle inherently acknowledges that Article III is an independent, external constraint on Congress to be implemented by the judiciary. *See also Simon*, 426 U.S. at 41 n.22 (stating, immediately after recognizing that Congress can create interests, the invasion of which will confer standing, that "[w]hen Congress has so acted, the requirements of Art. III remain").

To interpret a statute to thrust onto a court a particular claim that is not part of the judiciary's traditional, proper, and limited caseload in the constitutional framework would be to sanction a violation of the separation of powers by Congress. *See Muskrat v. United States*, 219 U.S. 346, 355 (1911) (congressional enactment requiring courts to determine rights in absence of contested case or controversy is unconstitutional because "[t]he power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other"), quoting *Gordon v. United States*, 117 U.S. 697, 700 (1864). As Professor Brilmayer explained in her landmark article, allowing a person

[14] Other circumstances exist where a union is statutorily entitled to information from an employer but cannot use an Article III court to enforce that obligation. The duty to bargain collectively under under 29 U.S.C. §158(a)(5), for example, includes the duty to provide relevant information to the union, *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979), but a union may not enforce that duty by seeking contempt. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 269-70 (1940).

without standing to bring a lawsuit undermines the basic power and effectiveness of the judicial system. Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297, 304-05 (1979).

Contrary to petitioner's protestations (Br. 13), there are no distinct Article III rules for cases involving private parties, and separation-of-powers concerns are not limited to instances in which litigants seek to use the courts to challenge governmental action. Quite apart from confining the judiciary to its proper role *vis-a-vis* other branches of government, strict enforcement of Article III in *all* cases is demanded by the principle of separation of powers in order to promote the practical and moral authority of judicial review. In *Valley Forge*, 454 U.S. at 471, the Court put it this way:

> "The power to declare the rights of individuals . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892). Otherwise, the power 'is not judicial ... in the sense in which judicial power is granted by the Constitution to the courts of the United States.' *United States v. Ferreira*, 13 How. 40, 48 (1852)."

See also Lujan, 504 U.S. at 580 ("This Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitation found in Article III") (Kennedy and Souter, JJ., concurring); *Honig v. Doe*, 484 U.S. 305, 340-41 (1988) (Scalia and O'Connor, JJ., dissenting).[15]

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[15] Thus, although *Lujan* did not decide on its face that the principle set forth in *Warth* and *Linda R.S.* cannot be expanded in situations which do not involve suits against the government, there is no principled basis to take a different view of Article III in cases between private parties. There are still separation-of-powers constraints in those actions. In fact, the thrust of

(Footnote 15 continued on next page)

Prohibiting Congress from manufacturing standing when there is none under Article III is not an intrusion on or inconsistent with the separation of powers, as petitioner and its amici seem to urge. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61-62 (1982) (Court has responsibility, notwithstanding deference owed to congressional decision to provide jurisdiction to non-Article III judges, to determine "whether the action of that branch exceeds whatever authority has been committed" to Congress by the Constitution); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The refusal to exercise jurisdiction in such circumstances reaffirms the primacy of Article III as an absolute limit on the jurisdiction of the federal courts and thus implements the separation of powers.

II. PETITIONER DOES NOT HAVE STANDING TO BRING A WARN ACTION FOR BACK PAY FOR AFFECTED PLANT WORKERS ON A "REPRESENTATIVE" BASIS.

A. Standing Is Not Conferred by the Union's Status as Collective Bargaining Agent or by Section 301 of the Labor Management Relations Act.

1. The Union is not the general litigating agent for its members.

The Union repeatedly maintains that its standing to sue flows naturally from its status as exclusive bargaining representative of its members (Br. 10, 16, 17, 25-26, 36-46).[16] But the rights

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(Footnote 15 continued)

scholarly commentary on this Court's Article III jurisprudence suggests that there should be broader or more generous standing for suits challenging governmental action. *See, e.g.*, Tushnet, *The "Case" or "Controversy" Controversy*, 93 Harv. L. Rev. 1698, 1708-09 (1980).

[16] It is unclear from petitioner's brief whether it believes that its "representational" status confers standing to sue in its own right or only on behalf of its

(Footnote 16 continued on next page)

which it purports to assert here do not stem from a breach of the collective bargaining agreement, and the Union does not seek any recovery for itself. Accordingly, the Union's status as collective bargaining agent creates nothing more than the kind of "abstract concern" found to be inadequate in *Simon*, 426 U.S. at 40, and *Warth*, 472 U.S. at 515. It is the type of generalized "interest in the subject" deemed insufficient in *Sierra Club*, 405 U.S. at 739.

It has been repeatedly held that a union is not the "general litigating agent" for union members and does not have standing to sue on their behalf for violations of federal statutes or common-law rights. In *United States ex rel. United Brotherhood of Carpenters & Joiners v. Woerfel Corp.*, 545 F.2d 1148 (8th Cir. 1976), the court denied standing to a union to file claims under the Miller Act on behalf of its members to obtain retroactive pay increases under an alleged collective bargaining agreement. Commenting that a contrary interpretation would create a "host of problems" *id.* at 1151 n.4, the court rebuffed the union's plea that it could sue because it was seeking wages on behalf of the members as the authorized representative under the collective bargaining agreement:

> "A collective bargaining contract, even where one is signed, is not a contract for the performance of services; it governs only the general rules of conduct between employer and employee. The right to the payment of money in this case remains with the individual employees for it is they, not the unions, who performed the services." *Id.* at 1151.

(Footnote 16 continued)

members. What is clear, though, is that the Union's position on this issue in this Court is 180 degrees from the argument made in the Court of Appeals, where Point D of its argument was captioned "Local 751 Has Standing In Its Own Right Under WARN, Not Representational Standing." (UFCW Br., 8th Cir., No. 94-1929, p. 10).

Addressing the contention that §301 of the LMRA, 29 U.S.C. §185, empowered the union to maintain such a lawsuit, the court said:

> "We disagree. While §301(b) does give a union capacity to sue and be sued as an entity under the LMRA, it does not appoint the union as the general litigating agent of its members . . . . Section 301(b) is simply a rule defining capacity to sue and does not give the unions [*sic*] a general right to represent its employees." *Id.* at 1151.

In *United Brotherhood of Carpenters & Joiners v. Ohio Carpenters Health & Welfare Fund*, 926 F.2d 550 (6th Cir. 1991), the court refused to permit a union to maintain an action for reimbursement of check-off dues under the Labor-Management Reporting and Disclosure Act, even though the statute provided that any persons whose rights under the statute were infringed could bring an action in federal court. The court concluded that the issue of standing must be determined by reference to the class of persons the statute was designed to protect, and noted that the statute "confers rights on members, not persons or labor organizations." *Id.* at 556. There, as here, the error in the union's standing analysis was that it "attempt[ed] to derive rights inuring to its own benefit from statutory provisions creating procedural safeguards for the rights of individual union members." *Id.* at 554.

See also United Steel Workers v. University of Alabama, 599 F.2d 56 (5th Cir. 1979) (union denied the right to assert a claim for damages for constitutional violations on behalf of members); *Local 194, Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976) (no union standing to sue for back pay under Title VII or §1981 even though unions are included among entities authorized to sue by Title VII); *New Beckley Mining Corp. v. International Union, United Mine Workers*, 18 F.3d 1161 (4th Cir. 1994) (union lacks standing to sue under RICO for misuse of federal training funds that alleg-

edly should have gone to individual members); *United Union of Roofers v. Insurance Corp. of America*, 919 F.2d 1398 (9th Cir. 1990) (union has no standing to assert members' claims for past wages secured by payment bond); *United States v. City & County of San Francisco*, 979 F.2d 169, 170-72 (9th Cir. 1992) (union lacks standing to appeal order approving promotion of candidates); *Brotherhood Ry. Carmen v. Delpro Co.*, 549 F. Supp. 780, 783-84 (D. Del. 1982) (union lacks standing to pursue back wages, benefits, or punitive damages under the Railway Labor Act on behalf of individual members; "There is a vast difference between having representative status to urge individual member's claims flowing from breach of a collective bargaining contract and associational standing to urge individualized member's damages for alleged violation of a federal statute").

2. Section 301 does not supply standing to assert claims for non-contractual damages.

In a related argument, petitioner suggests that §301 of the LMRA, 29 U.S.C. §185, supports its constitutional right to file this action (Br. 34-35). But that statute merely authorizes suits by a union for breaches of a contract with an employer to which the union is a party. There is surely nothing surprising about the proposition that a breach of contract creates a cognizable legal injury to the contracting party. In fact, claims for breach of the collective bargaining agreement *must* be brought by the union and cannot be asserted by individuals (who, after all, are not parties to the contract) unless the rights in question are "uniquely" personal rather than collective. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Gutierrez v. United Foods, Inc.*, 11 F.3d 556, 562 (5th Cir. 1994). But, as reflected by the previously-cited line of union cases such as *Woerfel Corp.*, 545 F.2d 1148, §301 does not somehow entitle a union to be the litigation torch-bearer for its members for other purposes.

Petitioner reads *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), as saving the day. *Hoosier Cardinal*, though, was by its terms limited to lawsuits brought to recover benefits "pursuant to the terms of a collective bargaining contract." *Id.* at 699. The Court emphasized that such an action is expressly authorized by §301's reference to "suits for violation of contracts between an employer and a labor organization" and that the union was simply implementing its role in the collective bargaining process. There was no discussion of Article III standing in *Hoosier Cardinal*, no doubt because the union as contracting party had undeniably suffered a cognizable injury that would be redressed by enforcement of the contract. The effort to equate this case with *Hoosier Cardinal* (Br. 35) is fatally flawed; it begs the dispositive question by assuming that the Union itself has suffered a legal injury under WARN and that the statutory remedy will redress that injury.[17]

3. No court has permitted an organization which has no damage claim of its own to sue for damages to its members without joining those members.

The previously-cited union cases also reflect the continuing vitality today of the statement made 20 years ago in *Warth*, 422 U.S. at 515, that associational standing has been approved only where the relief sought is a declaratory judgment, injunction or some form of preliminary relief.[18] As recently as 1990, standing still had never been upheld for an organization seeking damages on behalf of its members. *See National Ass'n of Realtors v. National Real Estate Ass'n*, 894 F.2d 937, 941 (7th Cir. 1990)

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[17] The Union's reliance on §301 is also severely strained because if its authority to bring suit on behalf of its members stemmed in any way from its status under the collective bargaining agreement, the parties have agreed all such disputes must be resolved by arbitration (JA 55).

[18] Perhaps this impediment explains why petitioner eschews any reliance on principles of "associational" standing (Br. 8-9).

("associations have been held to have standing under Article III of the Constitution to seek injunctive relief — but never damages, for reasons our earlier discussions may have helped clarify — on behalf of their members").

See also Telecommunications Research & Action Center v. Allnet Communication Services, Inc., 806 F.2d 1093, 1095 (D.C. Cir. 1986) ("lower federal courts have consistently rejected association assertions of standing to seek monetary, as distinguished from injunctive or declaratory, relief on behalf of the organization's members"); *Kansas Health Care Ass'n v. Kansas Dep't of Social & Rehabilitation Services*, 958 F.2d 1018 (10th Cir. 1992) (association does not have standing to assert claims for members where court would be required to examine evidence particular to individual members and individual participation would be required); *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979) (association has no standing to sue for damages to members under Clayton Act).[19]

The Union sensibly anticipates the problems created by the individual relief sought on behalf of some 277 plant workers and artificially suggests that a "one size fits all" remedy is appropriate here, thereby supposedly eliminating the need for individualized relief or participation (Br. 23). Although WARN itself characterizes the relief available to affected plant workers as "back pay," petitioner and its amici strive to divert attention from the need for individualized assessments by variously mischaracterizing such damages as "akin to an equitable rem-

[19] This Court in *International Union, UAW v. Brock*, 477 U.S. 274 (1986), reversed a ruling that had precluded a union from pursuing claims on behalf of its members, not because the union had standing to assert individual damage claims, but because the lower courts had misconstrued the nature of the relief being sought. That relief did not include damages for individual members, and "[n]either these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member." *Id.* at 287.

edy" (Br. 21), "easily calculated" (Br. 23), "liquidated damages" (Br. 21), and a "penalty" (Br. 23).

These attempts to homogenize the required damage calculations ignore the reality of this case. Under WARN, every employee who is deprived of an appropriate notice of plant closing is entitled to certain relief, denominated "back pay for each day of violation" (29 U.S.C. §2104(a)(1)(A)), and other monetary recompense. These statutory elements necessarily involve individualized issues. *See* §§2104(a)(1) and (2). Moreover, because the Union's contract for the Dixon plant provided piece-work compensation for all employees, proof of damages for each of the 277 workers would require establishment of each of the following personalized elements:

(1) The higher of his average pay rate for the last three years or his final regular rate (§2104(a)(1)(A)(i), (ii)), taking into account his individual piece-work rate for the period in question (JA 21);

(2) His lost benefits, including the cost of medical expenses incurred which would have been covered by the employer's plan (§2104(a)(1)(B));

(3) The number of days by which notice to him was deficient, up to a maximum of 60 days (*id.*);

(4) Any credits and/or offsets against his recovery allowed by §2104(a)(2).

Again, it is no answer that Congress has created "capacity" to sue for such damages because the need for individualized proof to recover those damages is part of the Article III requirement of redressability, which cannot be abrogated and which dictates that damage claims can only be pursued by the affected individuals. *Warth*, 422 U.S. at 515-16.

Petitioner concludes its brief by criticizing the Court of Appeals' analysis of "associational standing" and its application of *Hunt v. Washington State Apple Advertising Comm'n*, 432

U.S. 333 (1977). The Union does not argue for reversal on the basis that the Court of Appeals' interpretation of *Hunt* was erroneous, but insists instead that *Hunt* is inapplicable because only voluntary associations need to pass the *Hunt* test in order to possess standing.[20] This unsupported theory is refuted by the very facts of *Hunt* — the Washington Apple Advertising Commission was not a voluntary association, but was a creature of statute imposed on the state apple growers and financed by statutory assessments. Petitioner's position is also, of course, incompatible with this Court's application of *Hunt* in *Brock*, which involved a union, and with the consistent reliance on *Hunt* by the courts of appeals when assessing union standing. *See* pages 33-34 *ante*.

Petitioner then compounds this misinterpretation by claiming that the "individual participation" requirement of *Hunt* is a purely prudential test used only to measure the manageability of suits (and, again, only for voluntary associations) (Br. 45). This is a manifest misreading of *Hunt*, which stated that it was addressing standing "in a constitutional sense," derived its entire three-part test from the discussion of Article III in *Warth*, and enunciated the "individual participation" requirement based on the redressability problem posed by associational damage suits. *See Hunt*, 432 U.S. at 341-43.[21] Again, in *Brock* this Court addressed all three *Hunt* requirements and applied them to a

[20] The government's gratuitous and inappropriate attempt to transform this into an associational standing case, in light of petitioner's express disclaimer of such a theory, erroneously relies, *inter alia*, on cases in which the plaintiff was an individual who had suffered injury himself and sought to represent those similarly situated — as for instance under the FLSA or Rule 23 (U.S. Amicus Br. 26-27) — and on cases brought by federal agencies (*id.* at 27-28).

[21] Amicus unduly trivializes these concerns by characterizing them as merely relating to the "form — as opposed to the substance — of a plaintiff's proof" (U.S. Amicus Br. 26). The standing defect when individual relief is needed was articulated in *Warth* as part of the fundamental Article III requirement for "standing to invoke the court's remedial powers." 422 U.S. at 515.

union as part of what was avowedly an Article III inquiry. *See* 477 U.S. at 281.

Petitioner's use of the term "self-appointed" to characterize and purportedly distinguish the associational litigants in *Hunt* and *Brock* is a semantical shell-game. This Union is every bit as "self-appointed" a litigant as either of those plaintiffs. Congress did not "appoint" the Union to sue under WARN; the Union has no obligation to litigate, for Congress authorized the affected employees themselves to sue.[22] As described in the foregoing sections, both precedent and policy demonstrate that a union's statutory certification as collective bargaining representative is not a congressional "appointment" as a litigating representative for this distinct statutory issue. Neither the WARN Act nor the collective bargaining certification *per se* supplies the elements required by Article III.

As for the application of *Hunt*, suffice it to say — even though petitioner has not charged the Eighth Circuit with interpretational error — that the Court of Appeals was correct in finding that the third requirement of *Hunt* was not satisfied here. As noted previously, the participation of individuals is necessary, and the Union, purporting to sue for the rights of others, is not asserting a claim of distinct and palpable injury to itself which can be redressed by a favorable decision, as required by bedrock Article III doctrine. As this Court reminded us in *Warth*, 422 U.S. at 501-02, quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974):

> "Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains:

[22] The congressional grant of capacity to sue in §2104(a)(5) does not distinguish this case from *Hunt* because the Commission there was also authorized by statute to sue. *See* 432 U.S. at 339 n.3. The Court did not deem that authorization significant for Article III analysis.

the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants . . . . Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'"

B. Principles of Third-Party-Beneficiary Contracts and Enforcement Actions by Government Agencies Are Inapposite to the Standing Issue Presented Here.

The Union also seeks comfort in two other classes of cases which it claims support, by analogy, its standing to sue in this case (Br. 32-34). The comparisons advanced by petitioner are not even marginally persuasive.

Petitioner first maintains that the law of third-party-beneficiary contracts justifies a suit on behalf of its members, even though it is not seeking any relief for itself. This argument is far afield. In the first place, the third-party-beneficiary doctrine arises by definition in contract, not in tort or by statute, as here. It is based upon an express agreement by two contracting parties, A and B, to confer a benefit upon a third party, C. Most of the litigation in the law of third-party beneficiaries involves C's right to assert claims under the contract against A and/or B.

The Union cites no cases in which B — the promisee — was permitted to sue for damages for C without asserting some right to relief for itself. The only authority proffered by petitioner is *Corbin on Contracts*, §812, where the author makes reference to a "few" cases in the United States "that allow the promisee to sue as 'trustee' for the beneficiary, and to recover *not merely his own damages* but also the damages suffered by the beneficiary by reason of the promisor's breach of contract." (Emphasis added.) The author also cautions that some states have provided by statute for such an action. *Id.*

The third-party-beneficiary analogy is wide of the mark for at least four reasons: (1) the right-to-sue issue in those cases is more accurately couched in terms of state-law principles of "real party in interest," not Article III case or controversy requirements, and in any event state courts frequently have standing rules that are more relaxed than Article III; (2) the promisor, by expressly contracting with the promisee to confer a right on the third-party beneficiary, plainly subjects itself to a specific performance suit by the promisee if it fails to perform; (3) in contrast, the promisee is authorized to assert a claim for damages only if it has been injured and is seeking damages for itself; and (4) there is no authority for allowing the promisee to assert damage claims on behalf of a large number (say, 277) of would-be third-party beneficiaries.

Petitioner next tries to liken itself to governmental agencies, such as the EEOC, which are authorized by Congress to file damage claims on behalf of alleged discriminatees (Br. 33-34). The Union's citation of *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985), is curious, as the case contained no discussion of standing whatsoever. Nor was *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980), a standing case. The issue in *General Telephone* was whether the EEOC was required to comply with Fed. R. Civ. P. 23 when bringing an action for class-wide relief for victims of alleged discrimination. The Court emphasized the statutory mission of the EEOC to eradicate the effects of past discrimination. It ruled that the requirements of Rule 23 were inapplicable because the EEOC was not "merely a proxy for the victims of discrimination," *id.* at 326, and that EEOC enforcement suits should not be construed as "representative actions" within the meaning of Rule

23 because lawsuits filed by the EEOC serve "to vindicate the public interest in preventing employment discrimination." *Id.*[23]

The ability of executive agencies such as the EEOC to vindicate the right of those protected by statute is nothing more than a fulfillment of the executive branch's constitutional obligation to enforce Congress' laws. No such constitutional obligation to police the law is imposed upon labor unions. And while labor unions may be the statutory representative of their members for collective bargaining purposes under the LMRA, they are neither accountable nor responsible to any branch of the government, as are the executive administrative agencies.

If it is at all germane here, *General Telephone* raises probing questions about whether Congress, if it truly had intended for unions to assume the responsibility for back-pay litigation under WARN, could authorize the conduct of such "representative actions" without requiring notice to the employees and affording them the right to decline participation. *See Telecommunications Research*, 806 F.2d at 1097-98 (Bork, J., concurring) (associational standing creates Rule 23 problems); Note, "Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny," 61 Bost. U. L. Rev. 174 (1981). Unless the employees are given notice and afforded a chance to opt out as mandated by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the employer has no assurance that any disposition or settlement of the WARN claim will preclude further litigation by employees under principles of res judicata. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dism'd as improvidently granted*, 114 S. Ct. 1359 (1994).[24]

[23] For the same reason, the *dictum* in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 115 S.Ct. 1278, 1286 (1995), suggesting that "Congress *could* have conferred standing upon the Director without infringing Article III" does not further petitioner's cause.

[24] Amici's invocation of Rule 23 to justify the Union's position here ignores these principles and disregards the fact that many class actions are certified as such only on the issue of liability.

Furthermore, a union, for its own political purposes, may launch a suit on behalf of its members which is not favored or even approved by those members. *See Brock*, 477 U.S. at 297 ("a union may have reasons for instituting a suit — such as the publicity that attends a major case — other than to assert rights of its members") (Powell, J., dissenting). Indeed, these concerns are present here because after the dismissal of this action allegedly brought on behalf of 277 union members, an individual action was commenced, but only by 142 of those persons. One could surmise that approximately one-half of the plant workers may not have wanted the Union to undertake a crusade on their behalf but were given no right or opportunity to express their views before the Union embarked upon this lawsuit.

At any rate, there is a wide chasm between the present situation and the authorization of a federal agency to litigate to enforce the statutory scheme it is charged with administering and enforcing.

C. Cases Involving Traditional "Representatives" Do Not Support the Union's Standing.

Petitioner's Point II espouses the theory that the existence of various traditional "representative" plaintiffs, whose Article III standing has never been examined, justifies its standing here even in the absence of "personal" injury to it. The Union acknowledges that its theory would rewrite *all* of this Court's modern standing cases (Br. 37). For example, in *Simon*, 426 U.S. at 39, the Court rejected this very proposition:

> "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement."

In *Lujan*, too, the Court reemphasized that part of the "irreducible constitutional minimum of standing" is the requirement "that the party seeking review be himself among the injured." 504 U.S. at 560, 563.

Properly read, the "representative" cases are entirely (or at least almost always) consistent with existing Article III doctrine. The would-be representative is situated so that it satisfies Article III, including the "personal" injury requirement, for itself. The Union is simply not equivalent to any of these "traditional" representatives.

Petitioner invokes the *Wright & Miller* treatise for the proposition that "representative" actions are commonplace and that, by analogy, a union can assert damage claims for its members (Br. 36). In a lengthy footnote (*id.* at 36-37 n.9), petitioner cites numerous cases involving trustees, executors, guardians, receivers, administrators, etc., most of which did not even discuss standing.[25] The difference between those cases and the present one is fundamental and determinative: trustees, receivers, executors and administrators have title to the property or assets in question and, by definition, have a personal legal interest at stake. It is therefore fully consistent with the requirement of "personal injury" that they have the right to conduct litigation aimed at increasing the worth of that property and to defend actions designed to impair its value. Scott, *The Law of Trusts* §2.6 (4th ed. 1987). Here, there is no estate or property that the Union owns or is charged with protecting.

Cases involving guardians usually are predicated on a judicial determination that the ward is not capable of carrying on his or her own affairs, including the conduct or the defense of litigation, and that a "next friend" should be appointed. Indeed, even in capital cases the Court has ruled that a "next-friend" does not have standing to assert the rights of a condemned prisoner unless he provides "an adequate explanation — such as inaccessibility,

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[25] For the same reason, to the extent petitioner seeks to derive some precedential support from the fact that this Court entertained *North Star Steel Co. v. Thomas*, 115 S. Ct. 1927 (1995), on the merits, the short answer is that the union's standing was never briefed, argued or decided in *North Star*. Significant constitutional rulings are not made by default.

mental incompetence, or other disability — why the real party in interest cannot appear on his own behalf to prosecute the action." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990). The Union here can make no such showing. The union members are hale and healthy, and those who are interested have filed their own actions as "person(s) . . . aggrieved under paragraph (1)" of §2104(a).

Finally, each of the "representative" capacities to which petitioner would compare itself almost always involves the "representative" of a single individual or a small group — a beneficiary, a ward, or the like. None of the categories cited by the Union deal with a "representative" of a large group (say, 277) seeking individualized damages.

Petitioner's reliance on *Tyler v. Judges of Court of Registration*, 179 U.S. 405 (1900), is curious. There, the Court dismissed a proceeding brought by a putative representative under state law, even though his standing was not contested in the state system. While *Tyler* pre-dated modern notions of standing, the Court invoked the now-familiar requirements that a plaintiff "must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens," and that "[a] plaintiff cannot properly sue for wrongs that do not affect him." *Id.* at 407.

Petitioner further seeks analogous comfort in the trustee cases by pointing out that "in these instances, the representative typically has some concomitant legal duty to forward the interests of the party being represented" (Br. 41). To the extent that the Union is implying that it has a "duty" to pursue WARN cases on behalf of its members, it contradicts the correct statement to the contrary made at page 17, footnote 4 of its brief. There is nothing in WARN that imposes *any* duties on the employee representative, let alone requires it to take up the litigation mantle on behalf of affected plant workers. Those workers, after all, are given the right to sue in their own behalf if they so choose.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

THOMAS C. WALSH
(Counsel of Record)
MICHAEL G. BIGGERS
Bryan Cave LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000

JAMES N. FOSTER, JR.
MICHELLE M. CAIN
McMahon, Berger, Hanna, Linihan,
Cody & McCarthy
2730 North Ballas Road
St. Louis, Missouri 63131
(314) 567-7350

Attorneys for Respondent

ROBERT D. PICKLE
Vice President, General
Counsel & Secretary
Brown Group, Inc.
8300 Maryland Avenue
St. Louis, Missouri 63105
(314) 854-4110

Of Counsel

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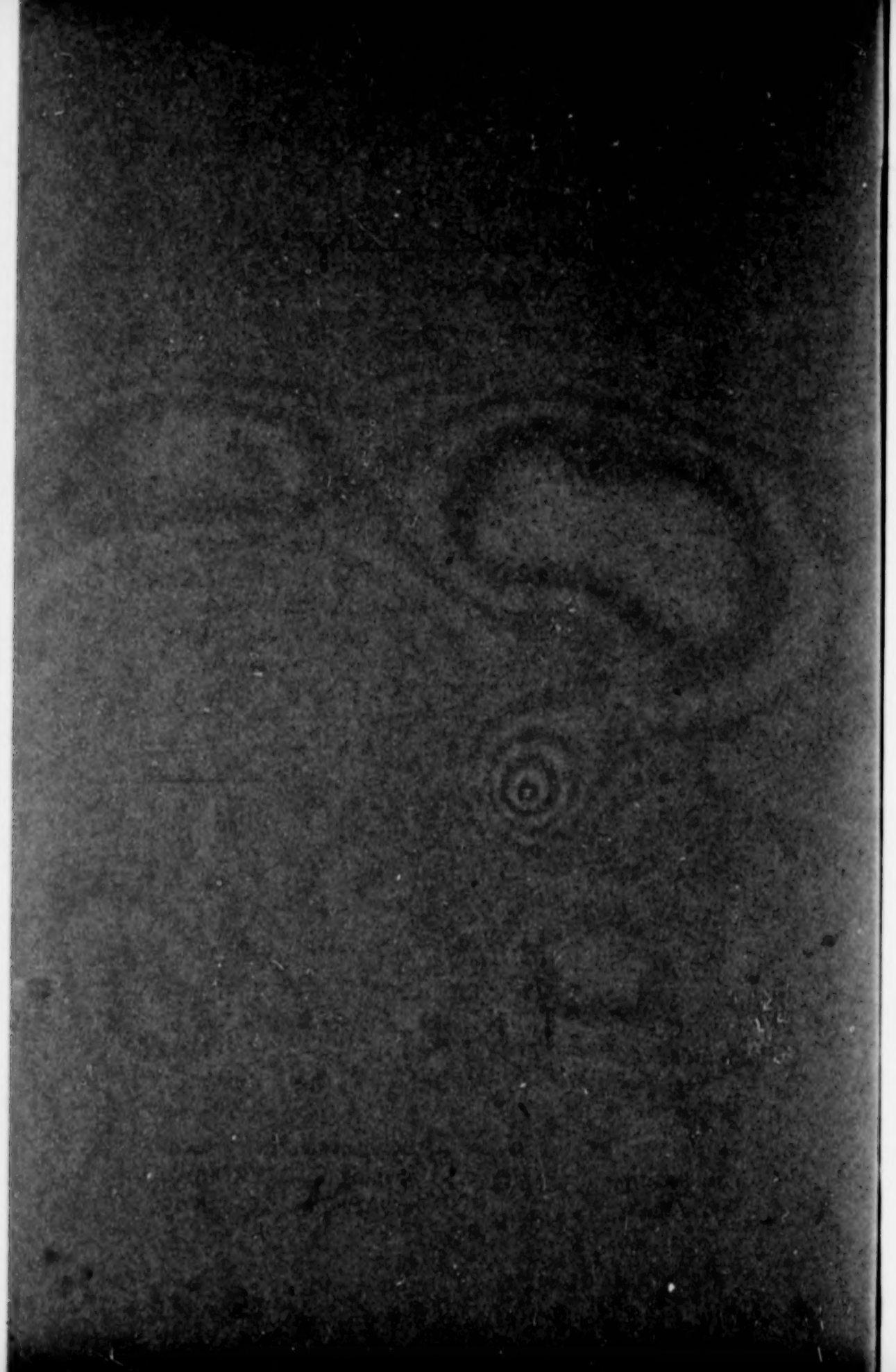
ADDENDUM



ADDENDUM

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE III

THE JUDICIAL DEPARTMENT

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . .

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATUTORY PROVISIONS INVOLVED

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT, Title 29, U.S.C.

§ 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions. As used in this Act . . .

(4) the term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act (29 U.S.C. 159(a),

158(f)) or section 2 of the Railway Labor Act (45 U.S.C. 152);

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer.

§ 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, state dislocated worker units, and local governments. An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order —

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act and the chief elected official of the unit of local government within which such closing or layoff is to occur.

§ 2104. Administration and enforcement of requirements

(a) Civil actions against employers. (1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —

(A) back pay for each day of violation at a rate of compensation not less than the higher of —

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by—

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

* * *

(3) any employer who violates the provisions of section 3 with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation . . . .

* * *

(5) a person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(b) Exclusivity of remedies. The remedies provided for in this section shall be the exclusive remedies for any violation of this Act. Under this Act, a Federal court shall not have authority to enjoin a plant closing or mass layoff. (Aug. 4, 1988, P. L. 100-379, 102 Stat. 893.)